of law for the court. See Your Home, Inc. v. City of Portland, 483 A.2d 735, 738 (Me. 1984).

The ordinance defines an "alteration" as a "change, addition, or modification, requiring construction, including any change in the location of structural members of buildings such as bearing walls, columns, beams, or girders, but not including cosmetic or decorative changes." Ordinance § 2.8. The terms "change," "addition" and "modification" are not further defined. Under Maine law, undefined terms must be given their common and generally accepted meaning unless the context requires otherwise. See, e.g., Camplin v. Town of York, 471 A.2d 1035, 1038 (Me. 1984). The ordinary meanings of "addition" and "modification" imply an alteration to, not an outright replacement of, an existing structure. The word "change," on the other hand, can be broader and can mean outright replacement, as in "change of clothes." But here we are talking about change as a subset of "structural alteration." In ordinary usage a "structural alteration" does not mean outright replacement of the structure. In fact, the reference to "change" in the definition section of the ordinance I have quoted refers to "change in the location of

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[13] (...continued)
deference by the federal courts due to federalism concerns. See Primeco Personal Communications v. Village of Fox Lake, 26 F. Supp.2d 1052, 1062-63 (N.D. Ill. 1998) (collecting cases). These concerns are compounded when a federal court must interpret substantive provisions of state law. Indeed, the First Circuit has commented, on a different provision of the Act, that it "would be 'surpassing strange' to preserve state authority in this fashion and then to put federal courts in the position of overruling a state agency on a pure issue of state law." Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd. of Puerto Rico, 189 F.3d 1, 15 (1st Cir. 1999).

structural members of buildings such as bearing walls, columns, beams, or girders. . . ."[14]

With this background concerning the ordinance, I turn to ICE's specific proposals. In its first proposal to the Board, ICE proposed to tear down all four existing towers and replace them with a single 200-foot tower constructed of newly-manufactured structural components. However, this tower would use one of the original foundations, its existing anchors and "perhaps" some of its guy wires. Pl.'s Mot. for Summ. J. at 9. According to ICE, that makes it a "structural alteration" rather than a new tower.

In its second application, ICE proposed to build a 170' replacement for the damaged 170' tower. Although ICE had been granted a permit to repair the damaged 170' structure,[15] ICE proposed instead to build a replacement tower in a different location. ICE's application stated that the tower would be moved to the center of the site for better anchorage. See Letter from David Littell, Esq. to

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[14] Moreover, to read section 5.33(g)'s conditional use permitting of "structural alterations" for safety purposes to allow a wholesale replacement is contrary to the philosophy of grandfathered nonconforming uses as expressed by the Maine Law Court. According to the Law Court, the "spirit of the zoning ordinances and regulations is to restrict rather than to increase any nonconforming uses, and to secure their gradual elimination . . . [t]he policy of zoning is to abolish nonconforming uses as speedily as justice will permit." Gagne v. Inhabitants of the City of Lewiston, 281 A.2d 579, 581 (Me. 1971) (quoting Inhabitants of the Town of Windham v. Sprague, 219 A.2d 548, 552-53 (Me. 1966)). See, e.g., Ordinance § 6.3 ("Once converted to a conforming structure, use, or lot, no structure, use, or lot shall revert to a nonconforming status"); Ordinance § 6.5 (nonconforming structure destroyed by fire or other causes to the extent of 65% or replacement cost may not be rebuilt or repaired except in conformance with ordinance or with a variance).

[15] On January 7, 1999, ICE requested a building permit to repair the 170' tower. This request was granted by Code Enforcement Officer Griesbach. ICE has not yet repaired the 170' tower.

Falmouth Zoning Board of Appeals of Jan. 4, 1999 at 1 (Pl.'s Ex. O); Transcript of Jan. 26, 1999 Board Meeting at 4 (testimony of David Littell, counsel for ICE) (Pl.'s Ex. LL); Letter from David Littell, Esq. to Michael Pearce, Esq. of Mar. 2, 1999 at 4 (Pl.'s Ex. V); Sketch Plan, Proposed Tower Location I.C.&E. Towers (Feb. 24, 1999) (Pl.'s Ex. V, tab 19); Mar. 23, 1999 Tr. at 35 (Pl.'s Ex. MM) (testimony of Don Cody, Director of Operations for ICE). The proposed 170' tower was also substantially wider than the original (60" vs. 18"). See Defs.' Statement of Facts ¶¶ 11, 35; Pl.'s Opposing Facts ¶¶ 11, 35. ICE's Director of Operations Don Cody testified that industry practice dictated that to repair a tower structurally, a builder must replace the tower rather than alter it piecemeal. See January 26, 1999 Tr. at 25-26, 30 (Pl.'s Ex. LL).

It requires no extended discussion to conclude that, under common and generally accepted meanings, substantial evidence supports the Board's decision that the proposed 200' and 170' replacements were new towers, not "structural alterations."[16]

(2) **Expansion of a Nonconforming Structure (Ordinance § 6.2(c))**

Section 6.2(c) of the Falmouth ordinance permits extension or expansion of a nonconforming structure "provided that the extension or enlargement is not located between the lot lines and the required setback lines, and does not compound nor create a lot coverage or height violation." ICE argues that the Board

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[16] In support of its summary judgment motion, ICE has not argued that its proposals were a structural alteration of one of the other towers (it proposed to use the guy wires and perhaps the foundation of a different tower) required to bring the non-damaged tower into compliance with the applicable safety standards. See Pl.'s Summ. J. Mem. at 11-12. I have therefore considered ICE's arguments solely regarding the replacement of the damaged tower.

should have granted its second application under this section, and that the Board's decision denying it permission to proceed under this provision was inconsistent with its decision in the first application, demonstrating that the Board lacked substantial evidence for its decisions.

The Board found that the proposed 170' tower was not an expansion as contemplated under section 6.2(c) for two reasons: first, it would be in an entirely new location and, second, it would involve tearing down the existing tower, not expanding it. See Decision (II) at 7-8 (Pl.'s Ex. AA). Section 6.2, it reasoned, was intended to grandfather nonconforming structures and to provide for limited enhancement of them. But once the tower was torn down, the grandfathered status would be lost. Id. at 8. The Board cited Ordinance § 6.3, which provides "[o]nce converted to a conforming structure, use or lot, no structure, use or lot shall revert to a nonconforming status."

I have already ruled that substantial evidence supports the Board's finding that the second application proposed a new replacement tower to be placed in a different location. Therefore, the Board was justified in refusing to apply section 6.2(c). ICE complains that the Board was inconsistent because in its decision on the first application—which did not raise a section 6.2(c) issue—it said that the 200' tower would be "an expansion of the non-conforming use" that would require ICE to meet variance standards. Using that language to explain why a variance is needed does not prevent the Board from concluding that the proposed tower is not

the sort of extension or enlargement contemplated by section 6.2(c). Substantial evidence supports the Board's decision.[17]

(3) Did ICE Qualify for a Variance (Ordinance § 8.4) on Either Proposal?

In both applications, ICE sought a variance if its application for a conditional use permit were denied. To obtain a variance, an applicant must prove "undue hardship." Ordinance § 8.4 (1990). "Undue hardship" requires an applicant to satisfy a four-part test under section 8.4: the applicant must prove that (1) the land cannot yield a reasonable return without a variance; (2) the need for a variance is due to the unique nature of the property and not to general conditions of the neighborhood; (3) the granting of the variance will not alter the essential character of the locality; *and* (4) the hardship is not the result of an action taken by the applicant or prior owner. Id.[18] ICE fails to meet both (1) and (4).[19]

(a) Reasonable Return

Under Maine law, "reasonable return" is not maximum return: to prove that land will not yield a reasonable return, an applicant must prove that strict compliance with the ordinance "would result in the practical loss of substantial beneficial use of the land." Goldstein v. City of South Portland, 728 A.2d 164, 165 (Me. 1999).

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[17] I note that under section 6.2(c) site plan review by the Planning Board is also required. The record does not disclose whether such a review was obtained.

[18] Falmouth's variance requirements are practically identical to those under Maine's Zoning Adjustment statute. See 30-A M.R.S.A. § 4353(4) (West Supp. 1999).

[19] Because I conclude that substantial evidence supported the Board's decision that ICE did not satisfy either the reasonable return or hardship provisions of the variance requirements, I do not address the third factor the Board relied upon, namely the failure to meet the unique circumstances requirement.

The Board found that ICE did not submit sufficient evidence to show that it could not get a reasonable return from the site if the tower were repaired rather than replaced. The Board concluded that ICE had operated equipment from the site since 1997 and that there was no evidence that, if the tower were repaired, ICE could not operate just as profitably as it had before the storm. See Decision (I) at 8 (Pl.'s Ex M); Decision (II) at 10 (Pl.'s Ex. AA). The Board also found that ICE had submitted no evidence that the site's value would be so much lower than its purchase price as to constitute "the practical loss of substantial beneficial use of the land." Decision (II) at 10 (Pl.'s Ex. AA).

Testimony during the public hearings provides substantial evidence for the Board's decisions. Cody testified that the 170' tower was functional before the storm. June 23, 1998 Tr. at 8 (Pl.'s Ex. JJ). Cody also stated that ICE was able to rent space on its towers to other providers. Id. at 5. During the hearing regarding ICE's first application for a 200' tower, ICE did not provide testimony or evidence that a 170' tower could not meet its licensing needs. See Sept. 22, 1998 Tr. at 7, 22 (Pl.'s Ex. KK); June 23, 1998 Tr. at 10 (Pl.'s Ex. JJ) (acknowledging that the 170' proposed tower does "a little less").

When ICE first purchased the Hardy Road site, it had been operating an 800 MHz system and obtaining good coverage at other sites and had planned to use an 800 MHz system on the Hardy Road tower. Jan. 26, 1999 Tr. at 3-4, 29 (Pl.'s Ex. LL). The 800 MHz system is much more tolerant of combining channels than a 900 MHz system, thus "using a minimum amount of antennas for a maximum amount of loading." Mar. 23, 1998 Tr. at 34 (Pl.'s Ex. MM). ICE, however, knew at the time

it purchased the Hardy Road site that this tower would probably not meet its needs in the future and would need to be upgraded. Jan. 26, 1999 Tr. at 29. ICE nevertheless then made a business decision to switch to a 900 MHz system, see Mar. 23, 1999 Tr. at 34, and subsequently sold the 800 MHz system to Nextel, see Jan. 26, 1999 Tr. at 29. The Board could find that the evidence ICE did submit on the subject of return was focused on its ability to run the 900 MHz system, not the more general question of a reasonable return on the land. See, e.g., Jan. 26, 1999 Tr. at 2 ("the system we're trying to build requires a loading of antennas and cabling that exceeds what this tower is capable of or will safely handle"), 25 ("We attempted to . . . get a tower slightly smaller than what we're proposing tonight in order to meet our needs").

While Cody testified that the physical location of the 170' tower prevented ICE from rebuilding on its foundation, Sept. 22, 1998 Tr. at 11 (Pl.'s Ex. KK), ICE did not provide specifications that discussed other possible business plans given that limitation. Neither did ICE submit any analysis of whether the existing towers could be "beefed up" to support the new system. Mar. 23, 1999 Tr. at 21. Justin Strout, a neighboring tower owner, testified that ICE never approached him about the possibility of co-location. Id. at 33. ICE also did not submit any concrete evidence regarding the price it could obtain for selling the property in its current or repaired condition.[20]

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[20] Cody testified that he could not sell the site because of the conditions of the towers and the fact that the site was not suitable for other uses, Sept. 22, 1998 Tr. at 18, 23-24 (Pl.'s Ex. KK), but ICE did not submit a real estate appraisal regarding the site's market value. Once the repair permit was granted, ICE had the option of repairing and re-
(continued...)

ICE wants to define "reasonable return" from its perspective, relying upon its business choice to move to the 900 MHz system and upon the premise that the ordinance should encourage technological advances. But in assessing "reasonable return," I do not conduct a *de novo* review. Instead, I determine whether there is substantial evidence supporting the Board's decision. Further, I look to Maine law for guidance, and the Law Court has already rejected an argument similar to the one advanced by ICE. See, e.g., Brooks v. Cumberland Farms, Inc., 703 A.2d 844, 848-49 (Me. 1997) (holding that even though an applicant's business was operating at a loss and its building would require a significant capital infusion to make it habitable, it had not met the "reasonable return" prong). Although not every reason the Board offered in rejecting the "lack of reasonable return" requirement is supported by substantial evidence, there is substantial evidence that ICE failed to show that it could not continue to offer other service (for example, 800 MHz service) if it repaired its tower. Therefore, substantial evidence exists to support the Board's decision that ICE did not meet its burden of proof on the "lack of reasonable return" requirement.

(b) Self-Created Hardship

The Board found that even though the ice storm may not have been predictable, ICE had created its own hardship by purchasing the property while the ordinance was in effect, thereby having "presumptive knowledge" of the ordinance.

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[20] (...continued)
establishing the pre-existing services. The Board was entitled to disbelieve Cody's testimony, so long as substantial evidence exists in the record to support that disbelief. See Group EMF, Inc. v. Coweta County, 50 F. Supp.2d 1338, 1348 (N.D. Ga. 1999).

See Decision (I) at 9-10 (Pl.'s Ex. M). The Board also recognized that knowledge of the zoning restrictions at the time the property is acquired "is only one factor to be considered in the self-created hardship analysis" under Maine variance law. Rocheleau v. Town of Greene, 708 A.2d 660, 662 & n. 1 (Me. 1998). Here, however, ICE made a business decision to acquire the existing towers and then made a further choice to alter the communications service it wanted to provide while decreasing the number of towers on the site. The core of ICE's presentation to the Board was that the existing towers, even at their height before the ice storm, structurally could not handle ICE's *new* SMRS communications need. See, e.g., Sept. 22, 1998 Tr. at 3. During the second application hearing process, Cody admitted that when ICE purchased the property it suspected that the existing towers would not meet its needs in the future. See Jan. 26, 1999 Tr. at 29-30. Nevertheless, it went ahead. Thus, substantial evidence supports the Board's conclusion that the hardship was self-created.

Substantial evidence supports the Board's decision to deny ICE's applications for both a conditional use permit and a variance. Summary judgment is GRANTED for the defendants on Count III of both Complaints.

B. Count II: Has Falmouth Effectively Prohibited Personal Wireless Services?

ICE claims that Falmouth has prevented the modernization of existing communication facilities and therefore prohibited or had the effect of prohibiting personal wireless service. Compl. ¶¶ 77-79; Am. Comp. ¶¶ 70-72. Under the Act, the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality

thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services ["PWS"]." 47 U.S.C.A. § 332(c)(7)(B)(i)(II) (1999). Since the Falmouth defendants have moved for summary judgment on this count, I review the evidence in a light most favorable to ICE.

A service provider does not have to point to a general ban against communications towers in order to succeed under this portion of the Act. Town of Amherst v. Omnipoint Communications, Inc., 173 F.3d 9, 14 (1st Cir. 1999). But a provider must meet a "heavy" burden: it must show "from language or circumstance not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Id.

ICE claims that the Board's application of the ordinance effectively prohibits personal wireless service. First, it argues, unless section 6.2(c) is interpreted to permit "expansions" that violate the fall zone setback requirement, tower owners will not be able to reconstruct obsolete towers to comply with new safety technology. See Pl.'s Opp'n Mem. at 19 n.16; Comp. ¶ 77.[21] The defendants concede that 14 of the 15 towers in Falmouth currently do not meet the fall zone setback requirement. See Defs.' Mot. for Summ. J. at 7. Thus, ICE argues, if the owner of one of these towers wants to replace a tower, he or she "would necessarily be limited to (i) replacing the tower with one of the identical design or

[21] ICE argued before the Board that "required setback lines" referenced in section 6.2(c) meant the minimum setbacks for the zoning district. The Board disagreed and ruled that the "required setback lines" included the fall zone setback requirement that applies to transmission towers. The Board also held that section 6.2(c) did not apply to "tear down and rebuild" situations. Decision (II) at 7-8 (Pl.'s Ex. AA).

dimension, or (ii) building a shorter tower that meets the ordinance's fall zone requirement." Pl.'s Opp'n Mem. at 19 n. 16.

But ICE does not offer evidence that all the existing towers are constructed in such a way that they can be upgraded only by violating the fall zone setback (for example, that they could be upgraded only by tearing down and replacing). Moreover, ICE has not demonstrated that the options it recognized—replacement with a tower of identical dimensions or building a shorter tower that does meet the fall zone requirement—are not feasible. See Amherst, 173 F.3d at 14-15; 360° Communications Co. v. Board of Supervisors of Albemarle County, Nos. 99-1816, 99-1897, ___ F.3d ___, 2000 WL 346182, * 5-8 (4th Cir. Mar. 15, 2000) (rejecting district court's holding that provider established a prohibition by showing it cannot provide a high level of service at a cost within or close to the industry-wide norm).

Most important, to prove an effective prohibition forbidden by the Act, ICE must provide proof of what amounts to a ban "in effect." Amherst, 173 F.3d at 14. In Falmouth, it appears that towers still may be constructed on parcels large enough to meet the fall zone requirement. On its face, the Falmouth ordinance permits towers up to 200' so long as their bases are 400' or more above sea level and they meet the fall zone setback requirements. The undisputed evidence shows that there are parcels within Falmouth that satisfy both criteria. See Defs.'

Statement of Material Facts ¶¶ 49-50; Pl.'s Opposing Statement of Material Facts ¶¶ 49-50; Defs.' Ex. 26A; Defs.' Ex. 26B.[22]

ICE responds that the suggestion that it (and any other tower builder under the preceding argument) could purchase land large enough to satisfy the fall zone requirement is a hollow one. It argues that despite its efforts, there was no available land other than the site it acquired. See Pl.'s Opp'n Mem. at 15-16. But the defendants present evidence that there is other land within Falmouth that meets the Forest and Farm District and 400' elevation requirement; that during its initial site purchase, ICE contacted only four people in exploring purchases within these areas;[23] and that ICE chose instead to pursue its policy of purchasing property with pre-existing towers. See Defs.' Statement of Material Facts ¶¶ 10, 16, 49-50; Pl.'s Opposing Statement of Material Facts ¶¶ 10, 16, 49-50. Thus, ICE has

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[22] Because ICE has failed to support its qualification of the defendants' Statement of Undisputed Material Facts ¶ 49 by a record citation, I deem paragraph 49 admitted pursuant to Local Rule 56(c). Although ICE objects to the affidavit of James Barker because Barker was not previously identified as a proposed expert witness and because it did not receive the results of Barker's investigations, ICE has not made a proper discovery motion to address its concerns.

[23] ICE president Fenton testified that he spoke with realtors and a landowner but could not remember their identities. Defs.' Statement of Material Facts ¶ 16; Pl.'s Opposing Statement of Material Facts ¶ 16; Fenton Dep. 44-53. When Fenton discussed purchasing the property from the one landowner he contacted, he admitted he never made a monetary offer to the landowner. Fenton Dep. at 47-48. ICE claims that Cody also approached a landowner concerning a potential sale of land to ICE but the land was unsuitable. See Pl.'s Opposing Statement of Material Facts ¶ 16; Cody Dep. at 45. I note that in its Opposition Memorandum, ICE recites different portions of deposition testimony and raises different factual contentions than either side asserted in their respective Statements of Material Facts. See, e.g., Pl.'s Opp'n Mem. at 15-16. However, under Local Rule 56, the facts contained in the parties' statement of material facts, properly supported by record citations, are what controls. If a party disputes facts, it must raise those disputes in accordance with Local Rule 56.

not generated a genuine issue of material fact on the unavailability of qualifying sites.

Finally, ICE argues that any other qualifying land was near residential areas, and that the Board would never have granted a conditional use permit application for such sites. See Pl.'s Opp'n Mem. at 17. But ICE does not offer evidence that the Board has uniformly viewed conditional applications of this type negatively. Instead, the summary judgment record shows the contrary. In 1991, Robert Harris requested conditional use approval to construct a 200' radio transmission tower and a variance for that new tower to violate the fall zone setback. See Harris Statement of Grounds of Variance Appeal at 1-2 (Pl.'s Ex. V, tab 17D). Although the property bordered local residences, the Board approved both the conditional use permit and a variance for his initial application as well as an application in 1993 for a modification of the pre-existing approval. See Harris Statement of Grounds for Variance Appeal at 1-2 (Pl.'s Ex. V, tab 17D); Falmouth Board of Zoning Appeals Notice of Decision (Nov. 27, 1991) (Pl.'s Ex. V, tab 17A); Falmouth Board of Zoning Appeals Notice of Decision (Jan. 29, 1993) (Pl,'s Ex. V, tab 17E).

Conclusory assertions are not enough to survive summary judgment. See, e.g., Nicolo v. Philip Morris, Inc., 201 F.3d 29, 33 (1st Cir. 2000). Because ICE has not offered sufficient evidence to establish a genuine issue of material fact on its assertion that further applications to the Board with different proposals would be

meaningless,[24] summary judgment is GRANTED for the defendants on Count II of both Complaints.[25]

C. Count I: Has Falmouth Unreasonably Discriminated Against ICE?

The Telecommunications Act provides that the "regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C.A. § 332(c)(7)(B)(i)(I) (1999).

ICE argues that Falmouth discriminated against it because (1) the defendants previously approved other locally-based tower owners/operators' setback violations in less compelling circumstances; (2) Falmouth routinely permits antenna placements and replacements without the need for prior approval by the Town; and (3) municipal towers are exempt from the fall zone requirement. Pl.'s Opp'n Mem. at 5-13.[26]

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[24] Under Amherst, a provider may succeed by showing that its proposal is the only feasible plan. 173 F.3d at 14. ICE offers no evidence that the two proposals it submitted were the only feasible plans for establishing telecommunication service to the greater Portland area.

[25] ICE frames most of its arguments under the Third Circuit's standard rather than the Amherst decision. See Pl.'s Opp'n Mem. at 13-19. The Third Circuit requires proof that (1) "the facility will fill an existing significant gap in the ability of remote users to access the national telephone network" and (2) "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives." APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 469, 480 (3d Cir. 1999). Because ICE has failed to offer sufficient facts to survive summary judgment under the First Circuit's Amherst analysis, I do not address ICE's arguments that there are factual disputes under the Third Circuit standard.

[26] The defendants argue that because ICE failed to satisfy the criteria of the ordinance, it was not unreasonable discrimination to deny permits. Just because the (continued...)

(1) Previous Applications

ICE recites four instances in which the Board has granted either a conditional use permit or a variance for two towers that violate the height setback since 1990.[27]

However, there is no allegation that at the time the applications were granted, the applicants operated "functionally equivalent services." See Pl.'s Opp'n Mem. at 6-9. Donald Cody states conclusorily by affidavit that either currently or at the time of ICE's applications there were personal wireless service providers broadcasting from these two towers that provided "functionally equivalent service" under the Act. Because ICE failed to raise this in its opposing statement of facts in compliance with Local Rule 56(c), the Cody Affidavit is not properly before me. Even if it were, that conclusory assertion is not enough to establish that the Board's decisions denying ICE's new towers amounted to unreasonable discrimination against ICE as compared to other providers. The "discrimination" prong prohibits a municipality from purposefully denying a PWS provider similar access to that which other functionally equivalent providers have. The Act does not mandate that a provider may construct a tower that does not satisfy the municipality's

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[26] (...continued)
Board's decisions were supported by substantial evidence, however, does not necessarily mean that the decisions satisfied the other requirements established in the Act. See Amherst, 173 F.3d at 14.

[27] In an attachment to its opposition memorandum, ICE submits additional exhibits. However, these exhibits are not referenced in its Opposing Statement of Fact, nor did ICE submit an additional statement of facts regarding the discrimination claim. Because ICE has failed to comply with Local Rule 56, I do not consider these additional submissions. In deciding this case, it has been difficult to ascertain the contents of the record for summary judgment purposes because the parties frequently have not complied fully with Local Rule 56.

zoning requirements merely because other providers have found a way to provide service to a given area. There is no suggestion that ICE could not get the same access to these other towers that its competitors obtained. Indeed, one of them—Nextel —purchased its competing 800 MHz rights and customer list from ICE. There is also no suggestion in the record that Falmouth was intentionally favoring other providers over ICE.[28]

(2) **Routine Antenna Placement and Replacement**

ICE also claims that Falmouth's policy of routinely permitting antenna placements and replacements without the need for building permits unreasonably discriminates against it. However, ICE has submitted no evidence to suggest that Falmouth would treat it differently from others if all it proposed was to add an antenna to a pre-existing tower. See Letter from Paul Griesbach to David Littell, Esq. of Feb. 8, 1999 (Pl.'s Ex. V at tab 15) ("It is not the practice of the Town of Falmouth to issue building permits for antennas added to transmission towers."). The essence of the Act's anti-discrimination provision is to prevent unreasonable differentiation among providers, not to prevent a locality from applying a neutral policy, applicable to all applicants falling within its scope.

(3) **Municipal Tower**

ICE argues that municipal towers' exemption from the fall zone requirement unreasonably discriminates against it. It is true that the ordinance language exempts municipally owned and operated towers from the transmission tower

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[28] If Congress had intended a "discriminatory effect" test rather than a discriminatory purpose test, it knew how to draft such a provision. See, e.g., 47 U.S.C.A. § 332(c)(7)(B)(i)(II) (1999) ("shall not prohibit *or have the effect of prohibiting* the provision of personal wireless service") (emphasis added).

requirement. See Ordinance § 2.146 (1990). In its opposition memorandum, ICE asserts that while ICE's application was pending, the Town Council was contemplating building a municipally-owned tower, which it would lease to other wireless service providers. Pl.'s Opp'n Mem. at 10. But ICE points to no admissible evidence showing that Falmouth has ever acted on any proposal to provide PWS from such a municipal tower.

* * * * *

I conclude that ICE has failed to generate a genuine issue of material fact in its discrimination claim.[29] This is not a case in which the Board denied an application on the basis that Falmouth's cellular phone or wireless needs were already being met. See Sprint Spectrum, L.P. v. Town of Easton, 982 F. Supp. 47, 51 (D. Mass. 1997). The ordinance as interpreted will affect all tower owners who want to repair by building a new tower that violates the fall zone setback requirements.[30] The Board's decisions were reasonable and there is no evidence

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[29] Instead, the evidence submitted by both parties under the "substantial evidence" count indicates that the Board did *not* have an intent to favor one provider over another. Board members repeatedly voiced feeling limited by the language of the ordinance despite their desires to approve ICE's applications. See, e.g., June 23, 1998 Tr. at 11 (statement of Smith); Sept. 22, 1998 Tr. at 13-14 (Pearce); Jan. 26, 1999 Tr. at 16 (McConnell), 26 (Audet), 46 (Audet and McConnell), 47 (Pearce); March 23, 1999 Tr. at 41 (Silverman), 43 (Pearce). There was testimony by other tower owners who indicated that they would apply for variances if ICE received one. See Sept. 22, 1998 Tr. at 19-20 (Pl.'s Ex. KK). But that testimony does not, by itself, indicate the defendants' intent to discriminate unreasonably against functionally equivalent service providers.

[30] The Act prohibits localities from affirmatively granting preferential treatment to one provider over another. APT Minneapolis, Inc. v. Eau Claire County, 80 F. Supp.2d 1014, 1023 (W.D. Wis. 1999); see also AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423, 427 (4th Cir. 1998) (finding no intent by the city council to favor a competing provider).

that the Board intended to discriminate unreasonably against ICE. Thus, summary judgment is GRANTED for the defendants on Count I.

D. Count IV: Section 1983

Because I conclude that there is no violation of the Telecommunications Act of 1996, ICE can obtain no relief under 42 U.S.C.A. § 1983.

II. CONCLUSION

Summary judgment is GRANTED to the defendants on all Counts of both Complaints and summary judgment is DENIED to the plaintiff on Count III of both Complaints.

SO ORDERED.

DATED THIS 9TH DAY OF MAY, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

ZONING AND SITE PLAN REVIEW ORDINANCE
TOWN OF FALMOUTH, MAINE

SECTION 5. SPECIFIC REQUIREMENTS

5.33 Transmission Towers [Adopted, 4/23/90]

To regulate the location and erection of transmission towers in all districts in order to: a) minimize adverse visual effects of towers through careful design, siting, and vegetative screening; and b) avoid potential damage to adjacent properties from tower failure and falling ice through engineering and careful siting of tower structures.

a. All transmission towers in the Farm and Forest District, with the exception of amateur (ham) radio towers and municipal transmission towers, shall be located so that the tower base is at or above elevation four hundred (400') feet based on United States Geological Survey datum referred to mean sea level. No transmission tower shall exceed two hundred (200') feet in height as measured from the tower base to the highest point of the tower and any attached receiving or transmitting device.

b. The tower base shall be set back from all property lines by a distance of one hundred (100%) percent of the total tower height, including any attached transmitting or receiving devices. Accessory structures and guy wire anchors shall meet the minimum setback of the zoning district.

c. To ensure that towers have the least practicable adverse visual effect on the environment, towers that are 200 feet or less in height and are not subject to special painting or lighting standards of any federal agency shall have a galvanized finish or be painted in a skytone above the top of surrounding trees and shall be painted in an earthtone below treetop level.

d. Unless existing vegetation provides a buffer strip the width or the required setback as calculated in subsection b, the Board shall require that all property lines along roadways or visible to existing abutting or nearby buildings (within 1/4 mile radius) be landscaped as follows:

    1. With six to eight (6-8') foot evergreen shrubs planted in an alternate pattern, five (5') on center and within fifteen (15') feet of the site boundary.

2. With at least one row of deciduous trees, not less than 2 ½" to 3" caliper measured three (3') feet above grade, and spaced not more than twenty (20') feet apart and within twenty-five (25') feet of the site boundary.

3. With at least one row of evergreen trees at least four to five (4-5') feet in height when planted, and spaced not more than fifteen (15') feet apart within forty (40') feet of the site boundary.

4. In lieu of the foregoing, the Board may determine that the existing vegetation must be supplemented to meet an equivalent means of achieving the desired goal of minimizing the visual impact. To assist in making that determination, the Board may require the applicant to provide a visual impact analysis by a qualified professional.

e. Accessory facilities in the Farm and Forest District may not include offices, long-term vehicle storage, other outdoor storage, or broadcast studios, except for emergency purposes, or other uses that are not needed to send or receive transmission signals.

f. Transmission towers erected after the effective date of this ordinance amendment shall meet all applicable requirements of federal and state regulations and shall be designed and installed in accordance with the standards of the Electronic Industries Association (EIA) *Structural Standards for Steel Antenna Towers and Antenna Supporting Structures*.

g. Within twelve (12) months of the effective date of this ordinance amendment, all existing transmission towers shall be inspected and analyzed by a qualified professional engineer. The engineer shall submit a letter of opinion under his seal to the Code Enforcement Officer (CEO) stating the condition of the tower, the maximum safe loading capacity, and steps that must be taken to correct any safety deficiencies. Safety inspections of all existing and newly erected towers shall be conducted annually thereafter by the tower owner/operator, and an inspection checklist developed by the CEO shall be submitted for his review and approval. Any structural alterations that may be necessary to increase the loading capacity or to bring a tower into compliance shall require conditional use approval of the Board of Zoning Appeals.

SECTION 6. NONCONFORMING STRUCTURES, USES AND LOTS

6.2 Except as provided in this subsection, a nonconforming structure or use shall not be extended or enlarged in any manner except as may be permitted as a variance. The following requirements shall apply to expansion or enlargement of structures which are nonconforming solely due to lot size, lot width, lot frontage, lot coverage, height or setback requirements.

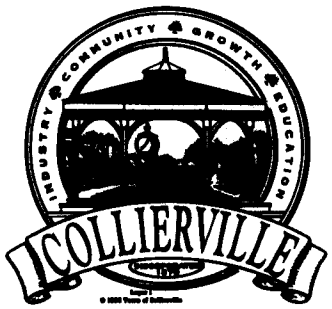
. . . .

c. A structure other than a single family detached dwelling which is nonconforming due to lot size, lot width, lot frontage, lot coverage, height or setback requirements, may be expanded or enlarged subject to Planning Board Site Plan Review, provided that the extension or enlargement is not located between the lot lines and the required setback lines, and does not compound nor create a lot coverage or height violation.

U.S. District Court
District of Maine (Portland)
Civil Docket for Case #: 98-CV-397

INDUSTRIAL COMMUNICATIONS AND ELECTRONICS, INC. plaintiff	PAUL MCDONALD, ESQ. 4 LIGHTHOUSE POINT RD CAPE ELIZABETH, ME 04107 (207) 767-1625
v.	
FALMOUTH, TOWN OF defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. AMY K. TCHAO, ESQ. DRUMMOND, WOODSUM, PLIMPTON & MACMAHON 245 COMMERCIAL ST. PORTLAND, ME 04101 (207) 772-1941
FALMOUTH ZONING BOARD OF APPEALS defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. AMY K. TCHAO, ESQ. (See above)
PAUL GRIESBACH, In his capacity as the Town of Falmouth Code Enforcement Officer defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
WILFRED AUDET, JR., In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
HUGH SMITH, In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
KATHLEEN SILVERMAN, In her capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)

MICHAEL PEARCE, In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)
DAVID McCONNELL, In his capacity as a member of the Town of Falmouth Zoning Board of Appeals defendant	JOHN GRAUSTEIN, ESQ. WILLIAM L. PLOUFFE, ESQ. (See above)



The Town of Collierville

May 26, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

RE: Lake Cedar Group's Petition for Expedited Special Relief and Declaratory Ruling, FCC Docket Number DA 00-764

Dear Ms. Salas:

On behalf of the Town of Collierville, I am writing to support the Comments of Jefferson County, Colorado in Docket number DA 00-764.

As noted in the Comments of Jefferson County, federal agencies do not have the authority to intervene in local zoning decisions and the Telecommunications Act of 1996 does not give the Commission authority to preempt local land use authority over broadcast towers. See Comments of Jefferson County at 6.

Section 332 (c), 47 u.s.c. 332 (c), generally preserves local zoning authority and only preempts this authority under a limited set of circumstances for wireless facilities. It does not include television broadcast towers. The Commission does not have the authority to preempt the zoning authority of the Jefferson County Board and the Commission should not grant the Cedar Lake Group's request.

In addition, local zoning decisions must weigh important local interests. Land use decisions are a core function of local government. This principle is well rooted and should not be disturbed absent strong Congressional intent, which does not exist here. Respectfully, the Commission is not in a position to be able to weigh these local interests. There are no guidelines or criteria for the Commission to make this local decision; the Commission should not attempt to do so.

Sincerely,

Chip Petersen
Assistant City Administrator

101 Walnut • Collierville, Tennessee 38017 • (901) 853-3200 • Fax: (901) 853-3230

Megalie R. Salas
Secretary, Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

RE: DA 00-764
Lake Cedar Group Petition "PETITION FOR EXPEDITED SPECIAL RELIEF AND DECLARATORY RULING" to preempt Jefferson County Denial of Supertower

Dear Ms. Salas:

I observed over the course of many months in 1998 and 1999 the conscientious process of the Jefferson County Board of County Commissioners in review of an application by the Lake Cedar Group, LLC, to rezone land on Lookout Mountain to allow for the construction of an 854-foot telecommunications supertower and adjacent support building. Theirs was an exhaustive and thorough review. The possibility that our community of more than 9,000 people would suffer the effects of even greater levels of electromagnetic radiation was cause for great anxiety. We were enormously relieved by the Commissioners' rejection of the application.

I am assured that alternative (and, most importantly, non-residential) sites to house the digital supertower do exist and would urge the Lake Cedar Group to explore those sites. Instead, I understand that they have petitioned the FCC to override the local authority in this matter. I ask that you respect the thoughtful decision-making of the Jefferson County Board of County Commissioners over what is a complex set of local zoning and other issues. To do otherwise would set a regrettable and dangerous precedent for our country.

Sincerely,

45 South Lookout Mtn. Circle
Golden, CO 80401

I, MARJORIE QUINN, certify that on this 25 day of May, 2000, I mailed a copy of this filing to:

Edward W. Hummers, Jr., J. Steven Rich
Holland & Knight LLP
Suite 400
2100 Pennsylvania Avenue, N.W.
Washington, DC 20037-3202

Signed by: Marjorie Quinn

cc: Frank Hutfless, Jefferson County Attorney; Deborah Carney, C.A.R.E. Attorney; Senator Wayne Allard; Peter Jacobson, Senator Allard's Office; Senator Ben Nighthorse Campbell; Congressman Tom Tancredo; Congressman Scott McInnis; Congresswoman Diana DeGette; Congressman Mark Udall

City of Morristown
Incorporated 1855

DEPARTMENT OF COMMUNITY
AND ECONOMIC AFFAIRS

May 25, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Lake Cedar Group's Petition for Expedited Special Relief and Declaratory
Ruling, FCC Docket Number DA 00-764;

Dear Ms. Salas:

On behalf of the City of Morristown, Tennessee, I am writing to support the Comments of Jefferson County, Colorado in Docket number DA 00-764.

As noted in the Comments of Jefferson County, federal agencies do not have the authority to intervene in local zoning decisions, and the Telecommunications Act of 1996 does not give the Commission authority to preempt local land use authority over broadcast towers. See Comments of Jefferson County at 6.

Section 332(c), 47 U.S.C. § 332(c), generally preserves local zoning authority and only preempts this authority under a limited set of circumstances for wireless facilities. It does not include television broadcast towers. The Commission does not have the authority to preempt the zoning authority of the Jefferson County Board and the Commission should not grant the Cedar Lake Group's request.

In addition, local zoning decisions must weigh important local interests. Land use decisions are a core function of local government. This principle is central to urban planning and should not be disturbed absent strong Congressional intent. Respectfully, the Commission is not in a position to be able to weigh these local interests. There are no guidelines or criteria for the Commission to make these decisions. Without the authority, or experience, to make this local decision, the Commission should not attempt to do so.

Respectfully Submitted,

Alan C. Hartman, AICP
Director of Community and Economic Affairs

P.O. Box 1499 • Morristown, Tennessee 37816-1499 • Phone: (423) 581-0100 • Fax (423) 586-1205

Legislative Viewpoint

www.njslom.com

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES
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WILLIAM G. DRESSEL, JR., Executive Director
CHRISTOPHER CAREW, Senior Legislative Analyst
JON R. MORAN, Senior Legislative Analyst
HELEN YELDELL, Senior Legislative Analyst

May 24, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: **Lake Cedar Group's Petition for Expedited Special Relief and Declaratory Ruling, FCC Docket Number DA 00-764**

Dear Ms. Salas:

On behalf of the New Jersey State league of Municipalities, I am writing to support the Comments of Jefferson County, Colorado in Docket number DA 00-764.

As noted in the Comments of Jefferson County, federal agencies do not have the authority to intervene in local zoning decisions, and the Telecommunications Act of 1996 does not give the Commission authority to preempt local land use authority over broadcast towers.

Section 332 (c) 47 U.S.C. Section 332 (c), generally preserves local zoning authority and only preempts this authority under a limited set of circumstances for wireless facilities. It does not include television broadcast towers. The Commission does not have the authority to preempt the zoning authority of the Jefferson County Board and the Commission should not grant the Cedar Lake Group's request.

In addition, local zoning decisions must weigh important local interests. Land use decisions are a core function of local government. This principle is well-rooted and should not be disturbed absent strong Congressional intent, which does not exist here. Respectfully, the Commission is not in a position to be able to weigh these local interests. There are no guidelines or criteria for the Commission to make these decisions. Without the authority, or experience, to make this local decision, the Commission should not attempt to do so.

Very truly yours,

William G. Dressel, Jr.
Executive Director

WGD/sm

LKM
League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

May 23, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Dear Ms. Salas:

On behalf of the 519 member cities of the League of Kansas Municipalities, I am writing to support the Comments of Jefferson County, Colorado in Docket number DA 00-764.

Our members are very concerned with the preservation of local zoning authority. Local governing bodies must carefully weigh important local interests and such land use decisions are a core function of local government. I urge the Commission not to disturb this fundamental principle.

Section 332(c), 47 U.S.C. § 332(c), generally preserves local zoning authority and only preempts this authority under a limited set of circumstances for wireless facilities. It does not preempt local zoning authority with respect to television broadcast towers. Therefore, the Commission should not preempt the zoning authority of the Jefferson County Board and should not grant the Cedar Lake Group's request.

Thank you for your consideration in this very important matter.

Respectfully Submitted,

Don Moler
Executive Director

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Lake Cedar Group L.L.C.	)	DA 00-764
Petition for Expedited Special Relief	)	
and Declaratory Ruling	)	

REPLY COMMENTS OF MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS CONSISTING OF:

National:	National Association of Counties, National League of Cities
California:	City of Cerritos
Colorado:	City and County of Denver and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
Florida:	Leon County
Illinois:	City of Marshall, Town of Downers Grove and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities (See full list attached as Exhibit A)
Michigan:	City of Detroit, Ada Township, Bloomfield Township, City of Belding, City of Cadillac, City of Gladwin, City of Livonia, City of Marquette, City of Monroe, City of Tecumseh, City of Walker, City of Westland, City of Wyoming, Canton Charter Township, Gaines Charter Township, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Robinson Township, Tallmadge Charter Township, Zeeland Charter Township
Texas:	Town of Addison, City of Arlington, City of Duncanville, City of Fort Worth, City of Grand Prairie, City of Irving, City of Plano, City of Rockwall, City of Schertz and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues)
Virginia:	City of Chesapeake
Wisconsin:	City of Brookfield

John W. Pestle
Matthew D. Zimmerman
VARNUM, RIDDERING, SCHMIDT & HOWLETTLLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Their Attorneys

June 7, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Lake Cedar Group L.L.C.	)	DA 00-764
Petition for Expedited Special Relief	)	
and Declaratory Ruling	)	

REPLY COMMENTS OF MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS

Municipalities and Municipal Organizations[1] (MMO) reply to the comments submitted in this matter as follows.

---

[1] **California:** City of Cerritos
Colorado: City and County of Denver and Greater Metro Telecommunications Consortium consisting of Adams County, City of Arvada, City of Aurora, City of Brighton, City of Castle Rock, City of Cherry Hills Village, City of Commerce City, Douglas County, City of Englewood, City of Edgewater, City of Glendale, City of Golden, City of Greenwood Village, City of Lafayette, City of Lakewood, City of Littleton, City of Northglenn, City of Parker, City of Sheridan, Town of Superior, City of Thornton, City of Westminster, City of Wheat Ridge
Florida: Leon County
Illinois: City of Marshall, Town of Downers Grove and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities (See full list attached as Exhibit A)
Michigan: City of Detroit, Ada Township, Bloomfield Township, City of Belding, City of Cadillac, City of Gladwin, City of Livonia, City of Marquette, City of Monroe, City of Tecumseh, City of Walker, City of Westland, City of Wyoming, Canton Charter Township, Gaines Charter Township, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Robinson Township, Tallmadge Charter Township, Zeeland Charter Township
Texas: Town of Addison, City of Arlington, City of Duncanville, City of Fort Worth, City of Grand Prairie, City of Irving, City of Plano, City of Rockwall, City of Schertz and TCCFUI (Texas Coalition of Cities on Franchised Utility Issues with approximately 100 municipalities as members)
Virginia: City of Chesapeake
Wisconsin: City of Brookfield

COMMISSION ASKED TO REZONE PROPERTY

As is set forth in the Comments of Jefferson County (and others), Lake Cedar Group applied to "rezone" property and was unsuccessful in that regard. See, e.g.-Comments of Jefferson County at 1. Thus one point clear: Lake Cedar is expressly asking this Commission to engage in--and set the precedent of--the rezoning of property.

The Commission should be aware that when property is rezoned, this allows any person to benefit from the change in zoning, not just the party requesting the zoning change.

This occurs because zoning typically "goes with the land," not just with the party requesting a zoning change. Thus if property is rezoned from residential use to commercial use, any commercial business typically can now construct and use a building on the property in question without any zoning approval. And such a use would be "grandfathered" against subsequent zoning changes.

The fact that the Commission is being asked to set the precedent of engaging in rezoning indicates why the Commission should not act, because the Commission lacks the authority or expertise to engage in zoning. Simply put, rezoning has major, long-term impacts and requires detailed local expertise and the consideration of local criteria which this Commission cannot and does not have, including the impact on the environment, land values, commerce and many other factors.

THRESHOLD INTO ENTITLEMENT

As Jefferson County's Comments set forth, Lake Cedar Group misses or confuses the distinction between (1)--the minimum requirements that must be met for the rezoning in question to occur, and (2)--the fact that meeting these minimums does not entitle an applicant to a rezoning if general considerations of health, safety and welfare dictate to the contrary. Jefferson County Comments at 3-5, 11, 13-15. According to Jefferson County, the minimum requirements for this rezoning include such matters as the availability of alternate sites and setback requirements. Jefferson County's zoning regulation Section 15.E.2 b(1) and (2).

General requirements take into account such matters as the number of residences in the area, tourist and historical sites nearby (Buffalo Bill's grave and Boettcher Mansion) and presumably other items such as property values and compatibility with Jefferson County's overall land use plan.

Municipalities and Municipal Organizations are concerned should the Commission take the unprecedented step (which Lake Cedar effectively requests) of turning the minimum requirements for rezoning into an entitlement to rezoning. Municipalities and agencies nationwide set minimum requirements for rezoning and other matters. They do so for good reasons such as providing guidance to potential applicants, ensuring uniform minimum standards and helping assure that any changes in zoning of particular lands are consistent with overall land use plans.

It would undermine land use and zoning policies nationwide if this Commission were to convert the minimum criteria for rezoning (or other zoning approvals or changes) into an entitlement to rezoning. Municipalities would effectively be prohibited from considering broader issues of health, safety and welfare, impacts on property values, the environment and overall land use plans. Comprehensive land use plans for communities would end up with Commission created holes and changes reminiscent of swiss cheese.

The Commission can appreciate the effect of such a change on its own rules and policies if, for example, the courts converted the minimum requirements for filing for a license or other substantive approval from the Commission into an automatic entitlement to the license or matter in question.

NEW EVIDENCE NOT ALLOWED

In its comments, Jefferson County objects to the Commission considering the alternate site study which Lake Cedar Group submitted to the Commission this spring. Jefferson County Comments at 1711.

Municipalities and Municipal Organizations agree because they are concerned about the precedent which would be set if Lake Cedar Group is allowed to introduce new evidence in this Commission proceeding which was withheld from the zoning hearing below. Specifically, the Jefferson County zoning ordinance

includes as one of the factors for rezonings such as Lake Cedar Group requested a demonstration that no existing telecommunications site could accommodate the facilities in question. Jefferson County Zoning Resolution Section 15.E.2 b(1). See Jefferson County Comments at 4. Lake Cedar Group was obviously aware of this requirement throughout the Jefferson County proceedings.

On March 23, 2000, Cedar Group submitted to this Commission a thick study by John F. X. Browne & Associates on the purported lack of alternate sites for the tower in question. The report on its face is dated December 19, 1999, some five months after Lake Cedar Group's rezoning petition had been denied.

It would be extremely destructive of judicial or quasi-judicial local zoning proceedings if the Commission allowed new evidence to be introduced in an appeal. This is particularly the case here where the evidence on the topic in question was expressly required by the Jefferson County Zoning Resolution. Allowing new evidence would seriously harm local zoning by encouraging applicants such as Lake Cedar to "game" the process by refusing to submit their best evidence below, and then in appeals to this Commission suddenly producing the withheld evidence as a basis for preempting local zoning.

No judicial or quasi-judicial proceeding can work well if an applicant can refuse to submit required data to a lower tribunal and then produce the data on appeal with a claim that the withheld data requires the lower tribunal's reversal. The Commission can appreciate the effects such a rule would have if applied to appeals of its own decisions. Principles of comity, due process, delegation and judicial economy are ignored if applicants are so encouraged to "pull punches" (i.e.-withhold evidence) from a lower tribunal in hopes that such tactics will aid them at an appellate stage which they view as more favorable. Meaningful local zoning decisions will be harmed by preventing local zoning and land use authorities from receiving all the facts and data which they need to make decisions in the public interest.

Equally importantly, if this Commission intends to allow new evidence in appeals such as this, it will be allowing zoning matters to be tried "de novo"[2] before it. Parties will withhold evidence at zoning hearings so as to get a denial and then a de novo rezoning hearing before this Commission. This would be a major step towards turning this Commission into a Federal Zoning Commission on all telecommunications-related matters.

BAIL OUT BAD BUSINESS DECISIONS

The facts revealed in the Comments raise serious concerns that the Commission may be being asked to bail out a handful of broadcasters from the bad business decisions they have made over the years. Specifically:

- The Lake Cedar Group members stated years ago that zoning approval on Lookout Mountain for broadcast towers would be hard to obtain and there were other viable sites. Lake Cedar Group member FCC Submission, quoted in CARE Comments at 26.
- The Lake Cedar Group members have argued to this Commission that it should not become involved in local zoning matters. Lake Cedar Group member FCC Submission, quoted in CARE Comments at 20.
- In prior comments to this Commission, the Lake Cedar Group members have argued that other broadcasters' "dogged pursuit" of towers on Lookout Mountain "defy sound business judgment" due to local zoning problems and the presence of alternate viable sites. Lake Cedar Group Member FCC Submissions quoted in CARE Comments at 19-20, 26.

---

[2]As opposed to on the record.

- Although this Commission's HDTV order was long anticipated, Lake Cedar Group waited over a year (14 months) after it was issued before seeking a rezoning of the land in question, rather than move in a timely fashion. CARE Comments at 50; Jefferson County Comments at 7.
- As set forth above, Lake Cedar Group failed to submit during the rezoning process a detailed study of alternate sites, even though the lack of alternatives was a specific requirement of the local zoning resolution.

Looking at the preceding facts as a whole, even if a few could be partially could be explained away, this may well be a case where the Lake Cedar Group broadcasters in reality are asking this Commission to rescue them from a series of bad business decisions they made, namely to pursue a new tower on Lookout Mountain when alternate sites were available, doing so tardily and doing so without submitting the evidence Jefferson County required.

The Commission should decline the broadcasters' invitation to save them from their own mistakes. This will only reward bad business judgement. One of the hallmarks of our economic structure is requiring businesses to bear the consequences (good or bad) of their decisions. This rewards good businesses and has the public benefit of weeding out bad businesses and bad managers. "Bailing out" the Lake Cedar Group broadcasters for their series of bad decisions removes this signal benefit of our economic system.

Instead, this Commission should let Lake Cedar's failure to meet the Commission's DTV rollout standards visit on them the market and Commission consequences for such failure. For example, other TV stations in Denver who do convert to DTV will gain market share, presumably at the expense of Lake Cedar Group members. This is the best way to achieve the public benefit of encouraging those broadcasters who can make good business decisions and (as a side benefit) avoid excessive government regulation from rescuing those who make bad decisions.

BROAD PRECEDENT

Alternatively, the facts set forth above showing "bad business decisions" by the Lake Cedar broadcasters could tend to make any Commission ruling preempting local zoning a fairly broad precedent. Presumably this is exactly what the National Association of Broadcasters and Lake Cedar Group intend. Members of the Lake Cedar Group (such as CBS) own multiple TV stations. The NAB represents all broadcasters. The broadcasters to date have been unsuccessful in getting the Commission by rule to preempt local zoning. Thus, the Commission's proposal to preempt local zoning of broadcast towers in Case MM 97-182 was never converted to a final rule. However, via the Lake Cedar Petition the broadcasters attempt to achieve much the same result on a case by case basis--with this being the first case. And the "bad business decision" facts set forth above could tend to make any such precedent fairly broad--if the Commission is willing to preempt local zoning in the face of such facts, broadcasters will ask it to preempt local zoning in a wide range of circumstances.

NO STANDARDS/IMPROPER DELEGATION

As set forth in the Comments of Jefferson County, the Lake Cedar Petition is impermissibly devoid of any criteria or standards by which this Commission would make a rezoning decision. Jefferson County Comments at 13. The action requested by Lake Cedar thus violates constitutional substantive due process requirements because this Commission is being asked to act before setting forth in advance the standards pursuant to which it will act. The Commission has previously proposed standards for over-riding state and local zoning (and other) laws affecting broadcast towers but so far has failed to adopt them. See Commission Case MM-97-182 "Preemption of State and Local Land Use Restrictions" in which the Commission issued a notice of proposed rule making on this topic, but never adopted a rule.

Rezoning, like all agency decisions, has to be governed by standards. Without these, any Commission decision is constitutionally unfirm.

In addition, the statute on which Lake Cedar relies for preemption unconstitutionally delegates congressional powers. Specifically, Lake Cedar relies on the general purposes of the Communications Act for preemption, namely, "to make available, so far as possible . . . a rapid, efficient, nation-wide and world-wide wire and radio communications service with adequate facilities . . ." 47 USC § 151 and the statutory statement that it is "the policy of the United States to encourage the provision of new technologies and services to the public." 47 USC § 157. Lake Cedar Petition at 24.

This claimed basis for preemption is an unconstitutional delegation of legislative power. American Trucking Associations, Inc. v EPA, 175 F. 3d. 1027 (D.C. Circuit 1999); petition for cert granted sub nom, Browner v American Trucking Associations (Supreme Court Case No. 99-1257). ("American Trucking Association").

In this case, as in American Trucking Associations, the Commission lacks "any determinate criterian for drawing lines" and has "no intelligible principle by which to identify a stopping point" on any claimed preemption of local zoning authority. Id at 1034. Any attempt at preemption of local zoning is thus constitutionally void under American Trucking Associations.

CONCLUSION

For the reasons stated above, the Lake Cedar Group Petition should be denied.

Respectfully submitted,

MUNICIPALITIES AND MUNICIPAL ORGANIZATIONS

Dated: June 7, 2000

By: _____

John W. Pestle
Matthew D. Zimmerman
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
BUSINESS ADDRESS AND TELEPHONE:
333 Bridge Street N.W.
Grand Rapids, MI 49504
(616) 336-6000
Their Attorneys

EXHIBIT A-ILLINOIS NATOA MEMBERS

Cook County
City of Chicago
Village of Lisle
County of Kane
City of Rock Island
Will County Governmental League
Village of Hoffman Estates
Village of Schiller Park
City of Darien
City of Marshall
Village of Carol Stream
Village of Orland Park
Village of Maywood
Town of Munster
City of Waukegan
Village of Glen Ellyn
City of Wheaton
Village of Oak Brook
Village of Oak Park
Village of South Elgin
Village of Grayslake
Village of Northbrook
Village of Mundelein
Village of Schaumburg
South Suburban Mayors & Managers Association
Village of Lombard
City of Flora
Village of Flossmoor
City of Galesburg
Village of Homewood
City of Pontiac
City of Des Plaines
City of Rolling Meadows
Elk Grove Village
Village of Lincolnwood
Village of Clarendon Hills
City of Crystal Lake
City of Highland Park
City of Naperville

City of Aurora
Village of Arlington Heights
Village of Algonquin
Village of Downers Grove
Village of Schiller Park
West Central Municipal Conference
City of Lake Forest
City of Champaign
City of Lone Tree
Village of Woodridge
Village of Savoy
City of St. Charles
Village of Niles
City of Rockford
Village of Libertyville
Village of Carpentersville
City of Moline
Village of Minooka
City of Rochelle
Village of Schiller Park
Village of Deerfield
Village of Rantoul
County of Lake
Village of Morton Grove
Village of Homewood
Village of Barrington
City of Springfield
City of Rolling Meadows
City of Evanston
Village of Elk Grove
Village of Riverside
Village of Park Forest
Village of Glenview
City of North Chicago
Village of Morton Grove
City of Greenville
Village of Mount Prospect
Village of Northfield
Village of Skokie

Village of Buffalo Grove
City of Urbana
Village of Glencoe
Village of Glen Ellyn
City of Aurora
Village of Palatine
Village of Round Lake Park
City of Greenville
Village of Wheeling
Village of Glencoe
Village of Deerfield
Village of Niles
Village of Antioch
City of Rockford
Village of Buffalo Grove
Village of Homewood
Village of Barrington
Village of Glenview
Village of Riverwoods
City of Oak Forest
City of Wheaton

CERTIFICATE OF SERVICE

I, Kim Van Dyke, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 7th day of June, 2000, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

The Honorable William Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
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